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The Constitutionality of Compulsory Identification Procedures on Less than Probable Cause: Reassessing the Davis Dictum

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The Constitutionality of Compulsory Identification Procedures on Less Than Probable Cause: Reassessing the *Davis* Dictum.

I. Introduction

When a crime is committed, the perpetrator often leaves some little part of himself behind. For example, police often discover fingerprints, hair specimens or blood samples. In other cases, a witness or victim is able to provide a physical description or make a voice identification. These clues can aid tremendously in identifying the culprit if they can be matched up with comparative samples taken from suspects.[1] However, when the person sought to be tested is unwilling to cooperate, the use of this law enforcement technique potentially conflicts with his personal rights.[2]

While compulsory participation in identification tests does not violate an individual's fifth amendment privilege against self-incrimination,[3] insuring his availability by force does constitute a seizure of the person,[4] which is protected by the fourth amendment.[5] To resolve

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1. Comment, *Detention for Taking Physical Evidence Without Probable Cause*, 14 ARIZ. L. REV. 132 (1972) [hereinafter cited as Comment, *Detention*]; Note, *Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 COLUM. L. REV. 712 (1972) [hereinafter cited as Note, *Detention*].

Other types of physical evidence which have been used to help solve crimes include palm prints, foot prints, body measurements, handwriting samples, urine samples, saliva samples, photographs, handprinting, and material removed from beneath fingernails.

2. An individual's rights are not violated when he voluntarily submits to the taking of evidence. However, "consent may not be coerced, by explicit or implicit means, by implied threat or covert force." Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) (dictum), *cited in* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 445 n.103 (1974).

3. *See, e.g.*, Gilbert v. California, 388 U.S. 263 (1965) (handwriting samples do not violate privilege), Schmerber v. California, 384 U.S. 757 (1966) (blood samples) do not violate privilege). United States v. Dionisio, 410 U.S. 1 (1972) (voice samples do not violate privilege). *But see* Hansen v. Owens, 619 P.2d 315 (Utah 1980) (order requiring handwriting sample violated state privilege against self incrimination).

Generally the distinction made is that evidence of a communicative or testimonial nature is protected while mere physical evidence is not. *See* Holt v. United States, 218 U.S. 245, 252 (1910).

4. *See* Davis v. Mississippi, 394 U.S. 721, 727 (1969) (detention for fingerprinting and questioning). *But see* United States v. Dionisio, 410 U.S. 1 (1968) (grand jury subpoena to give voice exemplar not fourth amendment seizure), United States v. Mara, 410 U.S. 19

the conflict between the police need and the individual's rights, a court must determine at what point a suspect is sufficiently connected to the commission of a crime that the public interest in solving that crime justifies subjecting him to the procedure against his will. Courts uniformly have held that probable cause, that is, evidence "sufficient to warrant a prudent man in believing that the [suspect] . . . had committed or was committing an offense,"[6] is sufficient evidence to compel participation.[7] Not surprisingly, the need for the procedures is sometimes greatest when the police do not have probable cause. For example, police may be certain that one member of a small group of persons committed a murder, (perhaps because of restrictive access to the scene), but do not have probable cause to believe that any *particular* person did the act.[8] When the police do not have probable cause, the constitutionality of compulsory identification procedures is uncertain.

Although the United States Supreme Court has not directly addressed the issue,[9] the Court suggested by way of dictum,[10] in *Davis v. Mississippi*,[11] that a brief detention for fingerprinting might be

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(1973) (grand jury subpoena to give handwriting sample not fourth amendment seizure).

5. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, paper and effects, against unreasonable searches and seizures shall not be violated, and no Warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

Compelling a suspect to participate in identification procedures requires two separate state actions. The first is forcing the person to appear at the place where the evidence will be taken. This is a seizure of the person which implicates the fourth amendment. *See* Davis v. Mississippi, 394 U.S. 721 (1969). The second action is the searching for and then seizing of the evidence from the individual. The Supreme Court has generally held this type of procedure not to constitute a search. *See infra* notes 140-41 and accompanying text.

6. Beck v. Ohio, 379 U.S. 89, 91 (1964). For further discussion of the requirement of probable cause *see infra* notes 16-19 and accompanying text.

7. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966) (blood samples); United States v. Wade, 388 U.S. 218 (1967) (lineup); Gilbert v. California, 388 U.S. 263 (1967) (handwriting specimens). Since probable cause is the standard required for the extensive intrusion of a full arrest, it is deemed *a fortiori* sufficient to justify the lesser intrusion of detention for the taking of physical evidence. *See* In re Armed Robbery, 99 Wash. 2d 106, 659 P.2d 1092 (1983).

8. For an account of two Colorado cases in which the need arose see Carrington, *Speaking for the Police*, 61 J. CRIM. LAW CRIM. & POL. SCI. 244, 257 (1970).

It is difficult to determine precisely how often the need for identification procedures arises when there is no probable cause to arrest. A Michigan legislative committee considering proposed legislation covering the area concluded that "no reliable estimate could be obtained as to how frequently such situations arise." *See* Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 222, 239 (1974).

9. The Court recently denied certiorari in State v. Hall, 93 N.J. 552, 461 A.2d 1155 (1983), *cert. denied*, 52 U.S.L.W. 3440 (12/5/83).

10. 394 U.S. 721 (1967).

11. The Court explicitly stated that it did not decide the question of whether identification procedures could be performed on less than probable cause, noting: "We have no occasion in this case . . . to determine whether the requirements of the fourth amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investiga-

squared with the requirements of the fourth amendment, under narrowly defined circumstances, even in the absence of traditional probable cause.[12]

Relying heavily upon this dictum, several lower courts have upheld identification procedures on less than probable cause.[13] Many of these decisions authorize procedures not mentioned in *Davis*.[14] Moreover, since *Davis*, the Supreme Court has handed down several important fourth amendment decisions that have shaped and defined the constitutional theory upon which the *Davis* dictum is based,[15] perhaps weakening the foundation on which the state compulsory identification schemes rest. This comment examines how state and lower federal courts have analyzed forced identification procedures on less than probable cause and reexamines the constitutional issue in light of recent Supreme Court decisions.

II. Balancing as a Theory of Constitutionality

Prior to 1967, all searches and seizures not based on probable cause were unconstitutional.[16] The Supreme Court did not define the standard in terms of precise mathematical probabilities;[17] rather, it viewed probable cause as a single, objective[18] standard to be uni-

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tion, the fingerprints of individuals for whom there is no probable cause to arrest." *Id.* at 727.

Both courts and commentators have consistently referred to the court's pronouncements as dicta. *See, e.g.*, In re Armed Robbery, 99 Wash. 2d 106, 109, 659 P.2d 1092, 1095 (1983); 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.6, at 153 (1978).

12. *Davis*, 394 U.S. at 727 (1967).

13. For a discussion of these cases *see infra* notes 58-76 and accompanying text.

14. The *Davis* decision, spoke exclusively in terms of detentions for fingerprinting, emphasizing the unique attributes of that procedure. State courts, however, have authorized a variety of identification procedures beyond fingerprinting such as lineups, handwriting samples, photographing, hair samples and blood samples. For a discussion of these cases *see infra* notes 58-76 and accompanying text.

15. The suggestion in *Davis* that identification procedures could be compelled on less than probable cause is based on a theory of constitutional analysis introduced in the cases of Camara v. Municipal Court, 387 U.S. 523 (1967), and Terry v. Ohio, 392 U.S. 1 (1968). The Court decided *Davis* in 1969, without the benefit of decisions examining either precedent.

16. For a definition of probable cause, *see supra* note 7 and accompanying text. The purpose of the requirement is well stated by Justice Rutledge in Brinegar v. United States, 338 U.S. 160, 176 (1949):

> These long prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. . . . Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers whim or caprice.

17. Rather than expressing probable cause by way of mathematical percentages, the Court has relied on the familiar terminology of reasonable belief. In describing the amount of suspicion necessary the court has stated: "[W]e deal with probabilities. . . . They are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." Draper v. United States, 358 U.S. 307, 313 (1959). Despite the importance of the probable cause standard, few Supreme Court decisions discuss the meaning of the concept. For a detailed discussion of various definitions of probable cause *see* Comment, *The Erosion of Probable Cause*, 13 N.C. Cent. L.J. 212 (1982).

18. The Supreme Court has held that subjective good faith on the part of the officer is

formly applied in all cases. Thus, differences in the severity of the particular intrusion or the importance of the government interest did not figure into the constitutional calculus.[19]

Two Supreme Court cases decided in 1967 and 1968 modified this approach by taking these factors into account. In *Camara v. Municipal Court*[20] the Court reviewed the constitutionality of a San Francisco ordinance which authorized city employees to make health and safety inspections of all personal residences without a warrant and without probable cause to believe that a specific violation existed.[21] The Court refused to prohibit the inspections on constitutional grounds merely because there was no *particularized* showing of probable cause. To comply with the requirements of the fourth amendment, the court held, the searches need only be reasonable,[22] and to determine reasonableness, the Court looked to "the need to search [balanced] against the invasion which the search entails."[23] In the particular case before it, the Court characterized the inspections as a "relatively limited invasion of the urban citizen's privacy." It also observed that the procedure had "a long history of judicial and public acceptance" and that they "were not personal in nature nor aimed at the discovery of evidence of a crime."[24] The Court also thought the goal of preventing health epidemics and fires was significant.[25] After balancing the equities, the Court concluded that specific knowledge of the conditions of a particular residence was not a constitutional prerequisite and permitted area wide searches under a reasonable legislative or administrative scheme.[26]

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not sufficient. Beck v. Ohio, 379 U.S. 89 (1964). *Accord* Henry v. United States, 361 U.S. 98 (1959) (prudent man); Beck v. Ohio, 379 U.S. 89 (1964) (man of reasonable caution). *See generally* 3 W. LAFAVE, *supra* note 11, § 3.2, at 459-61.

19. Several commentators argue that while the Supreme Court describes probable cause as a fixed standard, the Court actually considers the nature of the offense and the degree of intrusiveness when determining the level of evidence it requires. *See, e.g.*, Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763, 773; 3 W. LAFAVE, *supra* note 11, at § 3.2.

20. 387 U.S. 523 (1967).

21. The ordinance provided that:

> [A]uthorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure or premises in the City to perform any duty imposed upon them by the Municipal Code.

SAN FRANCISCO, CAL., HOUSING CODE § 503.

22. 387 U.S. at 534.

23. *Id.* at 536-37.

24. *Id.* at 537.

25. In assessing the government's need for area wide inspections, the Court gave weight to the official's contention that no other technique would be effective in policing violations because many substandard conditions were not observable from the outside of the building. *See id.* 387 U.S. at 535-36.

26. The Court did not describe in detail what would constitute an acceptable scheme. It did mention these factors: the nature of the building, the passage of time, and the conditions of the entire area. *Id.* at 538.

Terry v. Ohio,[27] decided the following term, applied the same balancing test in the context of criminal law. In *Terry*, a police officer who had confronted a criminal suspect, briefly searched the man's outer clothing because he believed that the suspect was carrying a weapon.[28] Denying Terry's motion to suppress, the Court held that the validity of the police conduct was to be judged by its reasonableness, determined by balancing the government interest against the severity of the personal intrusion.[29] The Court explained that while probable cause represented the appropriate balance in the ordinary search or seizure case, the limited nature of the brief frisk and the strong public interest in police safety merited a new balancing.[30] Ultimately, the Court concluded that the officer was justified in making the frisk upon his reasonable belief[31] that the suspect was armed and dangerous in spite of the absence of traditional probable cause.[32]

Since identification procedures based upon less than probable cause are per se unreasonable under the traditional approach, their validity when probable cause does not exist depends on the threshold question of whether the balancing test utilized in *Camara* and *Terry* is applicable and, assuming that a balancing test is applied, whether the intrusion is slight enough and the government interest strong enough to justify a departure from probable cause. The Supreme Court has not decided either of these questions, but the Court has addressed the issues in dictum in *Davis v. Mississippi*.[33] Because of the lack of authoritative precedent, the lower courts naturally have relied on the Court's pronouncements in *Davis v. Mississippi*.[34]

In *Davis*, the police briefly detained a suspect in a rape investigation at a police station and routinely questioned and fingerprinted him. Authorities later admitted that at the time of the detainment, the police did not have sufficient grounds to arrest Davis[35] but argued that their actions nevertheless were permissible based on a bal-

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27. 392 U.S. 1 (1968).

28. Prior to the confrontation, the officer had closely observed Terry and another man. Both Terry and the man had repeatedly walked by a certain store, peering into the store window each time they passed. The officer suspected that the men were "casing" the store, planning to hold it up. *Id.* at 5-7.

29. *Id.* at 20-21.

30. *Id.* at 26-27.

31. While the Court contemplated a standard of suspicion less rigorous than traditional probable cause, the Court noted that the officer's suspicion had to be based on specific and articulable facts rather than mere subjective hunches. *Id.* at 21.

32. *Id.* at 30.

33. 394 U.S. 721 (1969).

34. *See supra* note 11.

35. The police had few clues: Fingerprints found at the scene and the victim's general description that her assailant was a Negro youth. The police fingerprinted and questioned Davis solely because he fit the general description.

ancing theory.[36] In review of the case the Supreme Court appeared to accept this justification, noting that "[d]etentions for fingerprinting may constitute a much less serious intrusion upon personal security than other types of searches and seizures."[37] The Court based this observation on what it termed the unique attributes of the fingerprinting process described as follows:

> Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass an individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identification or confessions and is not subject to such abuses as the improper lineup and the third degree. Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time.[38]

Given the special features of fingerprinting, detentions for the procedure under "narrowly defined circumstances" might be found to comply with the fourth amendment upon a showing of less than probable cause.[39] However, the Court specifically declined to decide the issue in *Davis v. Mississippi* because the officials had made no attempt to minimize the offensiveness of the detention. The facts showed that the police had fingerprinted Davis twice, interrogated him at the police station, and had not obtained a warrant.

But the *Davis* decision offers only limited aid in answering the two questions posed above. By suggesting that it was open to allowing some detentions on less than probable cause, the Court implied that a balancing approach might be applicable. Certainly, *Davis* left unclear whether any other identification procedures would qualify for the lower standard. Moreover, even when fingerprinting is the identification procedure at issue, *Davis* does not answer when the "narrowly defined circumstances" arise to trigger application of the balancing test. The Court merely indicated that the combination of no warrant, questioning, and duplicate fingerprinting was too intrusive under the facts of the particular case. Despite these limita-

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36. The state also argued that the detention was not a seizure within the meaning of the fourth amendment because it occurred during the investigatory rather than accusatory stage. The Court soundly rejected this argument, explaining: "Nothing is more clear than that the fourth amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or investigatory detentions." *Davis*, 394 U.S. at 726, 727. *Accord* Terry v. Ohio, 392 U.S. 1, 19 (1968) (brief patdown for weapons subject to fourth amendment even though not full search).

37. *Id.* at 727.

38. *Id.*

39. *Id.* The Court cited Camara v. Municipal Court, 387 U.S. 523 (1967).

tions,[40] the *Davis* dictum has had a substantial impact on how courts and legislators have viewed compulsory identification procedures.

III. Impact of *Davis v. Mississippi*

A. Statutes and Court Rules

Many state officials regarded the *Davis* dictum as an invitation to act.[41] By 1973, six jurisdictions had passed legislation[42] or adopted court rules[43] that authorized magistrates[44] to order criminal suspects to participate[45] in identification procedures on less than probable cause. A seventh state adopted a similar rule in 1979.[46] Significantly, these provisions are not limited to fingerprinting. Most of the states authorize detention for all of the following: taking photographs; obtaining specimens of blood, hair, urine, and saliva; taking handwriting samples, voice samples, fingerprints, palm prints, foot prints, and other body measurements; and using lineups.[47]

The state schemes vary on what level of suspicion is required to

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40. See Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011, 1041 (1973), in which the author argues that the Court's cryptic dictum in Davis must be read narrowly.

41. *See generally*, 3 W. LAFAVE, *supra* note 11, § 9.6, at 153, 154; Note, *Detention supra* note 1, at 714. Prior to *Davis*, there were no statutes or court rules which authorized identification procedures on less than probable cause. *See* Comment, *Detention supra* note 1, at 144-46.

42. ARIZ. REV. STAT. ANN. § 13-3905 (1978); IDAHO CODE § 19-625 (1979); NEB. REV. STAT. § 29-3301 - 29-3307 (1979); N.C. GEN STAT. § 15A-271 - 15A-282 (1983); UTAH CODE ANN. § 77-8-1 - 77-8-4 (1982). For law review articles discussing particular statutes *see* Comment, *Detention note* 1 (Arizona) and Comment, *Nontestimonial Identification Orders Without Probable Cause*, 12 WAKE FOREST L. REV. 387 (1976) (North Carolina).

43. COLO. R. CRIM. P. 41.1.

44. Every state measure provides that the identification order be issued by a judicial officer. In *Davis* the Court suggested that the feature would be required in every case "because there is no danger of destruction of fingerprints [and] the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context." *Davis*, 394 U.S. at 727. *But see* Justice Harlan's concurrence in *Davis* in which he argues that there might be emergency situations where no warrant would be required. *Id.* at 728-729 (Harlan, J., concurring).

45. The state schemes differ as to how the identification orders are carried out. In three states the court issues an order directly to the suspect to appear upon his own initiative at a designated time and place. (Arizona, Idaho, North Carolina). In Colorado, the order is directed to a police officer who is authorized to take the person into custody for performance of the procedures. A third group of states either provides for both types (Nebraska) or does not specify (Alaska, Utah).

46. ALASKA R. CRIM. P. 16(c)(1)-16(c)(3).

47. Arizona, Colorado, Idaho, and North Carolina permit all of the procedures mentioned in the text. Alaska permits all of the procedures mentioned but the following: palm prints, foot prints, other body measurements, urine samples and saliva samples. Utah permits only lineups. In addition, the following procedures are available in the indicated states: material from under fingernails, physical or medical examination, trying on clothing (Alaska, Colorado); handprinting (Nebraska, Utah). Arizona, Colorado, Nebraska and North Carolina allow for the possibility of procedures not specifically listed.

justify the detention. Alaska's, the strictest standard, requires probable cause to believe that an offense was committed by one person of a narrow focal group that includes the subject person.[48] Four states require only reasonable grounds to suspect that the person committed an offense.[49] Finally, two states authorize the procedures upon a mere showing that the evidence might contribute to the identification of an individual who committed an offense.[50]

The American Law Institute,[51] the National Conference of Commissioners on Uniform Law,[52] and the American Bar Association,[53] have also proposed schemes for administering identification tests on less than probable cause. On the federal level, a proposed Senate bill[54] granted district court judges the authority to order individuals to appear before a magistrate for the taking of physical evidence upon a showing that the evidence might help identify a person who committed a criminal offense.[55] Also, the Advisory Committee on Criminal Rules drafted Proposed Federal Rule of Criminal Procedure 41.1, which likewise would provide for compulsory identification orders on less than probable cause.[56] Neither the senate bill nor

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48. ALASKA R. CRIM. P. 16(c)(1)-(c)(3).

49. The precise language varies from state to state: "Reasonable grounds, not amounting to probable cause to arrest, to suspect the person committed the offense." (Colorado); "Reasonable grounds, which may or may not amount to probable cause to believe that the identified person committed the offense." (Idaho); "Reasonable grounds to suspect that the person named or described in the affidavit committed the offense." (North Carolina); "There is reason to believe the suspect committed [the offense]. . . ." (Utah).

50. ARIZ. REV. STAT. ANN. § 13-3905 (1978); NEB. REV. STAT. § 29-3301 - 29-3307 (1979).

51. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE art. 170 (1975). The Model Code provides that an authorized judicial officer may order an individual to appear for a wide range of identification procedures upon evidence showing reasonable grounds to suspect that the individual committed the offense and it is reasonable in view of the seriousness of the offense to subject him to the specific identification procedure.

At least one state court has modeled its judicially created scheme upon the provisions of the Model Code. *See* Hall v. New Jersey, 93 N.J. 552, 461 A.2d 1155 (1983).

52. UNIF. R. CRIM. P. 436 (1974). The Uniform Rule is similar to the Model Code in that it authorizes a court to order participation in a large variety of identification procedures. However, the Uniform Rule is more strict. The Uniform Rule requires that the judicial officer only issue an order upon a finding of probable cause to believe that an offense has been committed by one or more of several persons comprising a narrow focal group that includes the subject person.

53. STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL, § 3.1 (1970). The A.B.A. standard provides that a judicial officer may require an accused to participate in several different types of evidence gathering techniques regardless of whether he has been formally charged. The standards, however, do not specify the level of suspicion required to justify the order. They merely state that the order shall be subject to constitutional limitations. ALASKA R. CRIM. P. 16(c) was apparently modeled after the A.B.A. standards. *See* Liston v. State, 658 P.2d 1347 (Alaska Ct. App. 1983).

54. S. 2997, 91st Cong., 1st Sess. (1969).

55. For the full text of the bill which authorizes a variety of identification procedures, *see* MODEL CODE *supra* note 51, Appendix VIII-G. Arizona's identification statute was apparently modeled upon the Senate bill. *See*, Comment *Detention supra* note 1, at 144-45.

56. PROPOSED AMENDMENTS TO THE FED. R. CRIM. P. (Pre. Draft 1971), *reprinted in* 52 F.R.D. 409 (1971). The proposed rule authorizes several identification procedures upon reasonable grounds not amounting to probable cause to suspect that the individual committed

the proposed court rule has been adopted.[57]

B. Judicial Reaction

The state provisions have produced little litigation. Only two schemes have faced constitutional challenge; in each case the validity of the provision was upheld.[58] In *State v. Grijalva*,[59] Arizona authorities sought an order under the state scheme to fingerprint, photograph, and take hair samples from a rape suspect. The suspect challenged the statute because it failed to require probable cause. Applying a *Camara/Terry* balancing test,[60] the court rejected this challenge. It found the public interest sufficiently great because the statute only authorized orders when the crime under investigation was an offense punishable by more than one year[61] and when the evidence sought was not otherwise available.[62] It also thought the intrusion upon the test subject was slight.[63]

In *People v. Madson*,[64] the Colorado Supreme Court upheld its state's court rule providing for compulsory identification. In that case the state high court rejected the constitutional argument of a murder suspect who, without a showing of probable cause, was ordered to give a handwriting sample. The court thought the rule was within the *Terry* exception to the probable cause requirement because under the rule, the police could only coerce nontestimonial evi-

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the offense. For a discussion of the proposed rule *see* Note, *Detention supra* note 1; Comment, *Proposed Federal Rule of Criminal Procedure 41.1*, 56 MINN. L. REV. 667 (1972).

57. United States v. Holland, 552 F.2d 667, 673-74 (5th Cir. 1977), *withdrawn* 565 F.2d 383 (5th Cir. 1977). The Senate bill did not survive committee. *id.* at 673. The Proposed Rule was rejected by the Judicial Conference in part because "[t]he committees and the conference should have the benefit of more experience with such procedure in the states and in the District of Columbia and of judicial consideration of the constitutional question involved." *Id.* at 674.

58. ARIZ. REV. STAT. ANN. § 13-3905 (1978); COLO. R. CRIM. P. 41.1. In State v. Swayze, 197 Neb. 149, 247 N.W.2d 440 (1976), a woman suspected of attempting to murder her child challenged a court order which directed her to submit to a blood sample. She maintained that the Nebraska statute which authorized the order was unconstitutional. The Nebraska Supreme Court held that the statute as applied was constitutional. The court, however, seemed to have assumed the existence of probable cause. *Id.* at 247, N.W.2d at 447.

59. 111 Ariz. 476, 533 P.2d 533 (1975), *cert. denied*, 423 U.S. 873 (1975).

60. *Accord*, Long v. Garrett, 22 Ariz. App. 397, 527 P.2d 1240 (1974) (constitutional challenge to Arizona statute rejected; woman suspected of cashing stolen check ordered to submit handwriting sample).

61. North Carolina, Colorado and Idaho have similar provisions that restrict the use of orders to cases in which the investigated offense is punishable by at least on year in prison or constitutes a felony. The restriction seeks to ensure that the government interest in solving the crime is sufficiently great to justify a departure from probable cause.

62. The Alaska and Idaho schemes also include this feature. The restriction is thought to serve two purposes: 1) reduce the number of occasions that law enforcement officials approach the court for orders, and 2) limit the use of orders for harassment purposes. *See* MODEL CODE, *supra* note 51, at 105.

63. The Court noted that photographs and fingerprints involved none of the probing *Davis* found objectionable and that the clipping of hairs was only the slightest intrusion.

64. 638 P.2d 18 (Colo. 1981).

dence;[65] the evidence they sought had to be of material aid in solving the crime;[66] and they had to obtain a judicial warrant in advance.[67]

Law enforcement officers have petitioned courts for like orders in states where no court rule or statute has been adopted. In these states, the petitioned court first must decide whether it possesses the power to issue identification orders on less than probable cause without explicit authorization. A number of courts have refused to issue orders on the theory that they lack the power.[68] Other courts have found the power in either a grant of general jurisdiction,[69] constitutional authority over searches and seizures,[70] or implicit statutory authority.[71]

Courts which have no authority for forced identification by statute or by court rule have split on the constitutional issue. The leading case to approve the procedures based on less than probable cause is *Wise v. Murphy*,[72] decided by the District of Columbia Court of Appeals in 1970. In *Wise*, police sought an order to compel a rape suspect to participate in a lineup. The victim of the rape had picked Wise out of a photo array but requested a personal confrontation to confirm her suspicions. The court noted that the lineup, while a more severe seizure than the momentary stop in *Terry*, was still of lesser magnitude than a formal arrest. For this reason, the court permitted the procedure to be tested for its reasonableness. In doing so, the court determined that the public interest in apprehending the rapist justified the procedure even in the absence of probable cause.[73]

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65. The forced production of nontestimonial evidence has been held not to violate the suspect's privilege against self-incrimination. *See supra* note 3. This observation, however, does not consider the overall intrusiveness of the detention which is the central fourth amendment inquiry.

66. Alaska and North Carolina also require that the evidence sought be of material aid in solving the crime. The restriction seeks to limit the issuance of orders to cases in which the law enforcement need is great. The effectiveness of the safeguard, however, will depend on how judges define the vague term "materially aid."

67. For a discussion of the warrant requirement, see *supra* note 44 and accompanying text.

The decisions upholding the validity of state provisions have been criticized. *See* In re Abe A., 56 N.Y.2d 288, 295, 437 N.E.2d 265, 269, 452 N.Y.S.2d 6, 10 (1982) ("[I]t is hard to regard such holdings as constitutionally firm."), In re Armed Robbery, 99 Wash. 2d 106, 111-12, 659 P.2d 1092, 1095 (1983).

68. *See, e.g.*, People v. Marshall, 69 Mich. App. 288, 244 N.W.2d 451 (1976) (no jurisdiction unless provided by statute or court rule); Alphonso C. v. Morgenthau, 50 A.D.2d 97, 376 N.Y.S.2d 126 (N.Y. App. Div. 1975) (general jurisdiction does not provide authority to order detention unless upon probable cause); In re Abe A., 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982) (absent express provision, no waiver to issue warrant unless satisfy search warrant requirement of probable cause).

69. *See, e.g.*, State v. Schweitzer, 183 N.J. Super. 228, 443 A.2d 767 (App. Div. 1981).

70. *See, e.g.*, State v. Hall, 93 N.J. 552, 461 A.2d 1155 (1983).

71. *See, e.g.*, Wise v. Murphy, 275 A.2d 205 (D.C. Cir. 1970).

72. *Id.*

73. The court, however, expressed

> [g]rave reservations . . . as to whether this type of court-ordered lineup, not

The New Jersey Supreme Court followed the *Wise* decision in *State v. Hall.*[74] In that case, the court reasoned that *Davis* mandated three conditions before a departure from probable cause could be made: 1) detention must not significantly intrude upon individual privacy and freedom; 2) procedures must lead to production of reliable evidence; 3) procedures must be administered without abuse, coercion, or intimidation. Regulated by special safeguards, the court announced,[75] the lineup met these conditions.[76]

A few courts have found certain procedure to be unconstitutional without a showing of probable cause. In *In Re Multi-Vehicle Accident,*[77] the court refused to issue an order for the photographing of a man who was suspected of leaving the scene of an accident. Though the court applied a reasonableness standard, it ruled on the merits that the underlying offense was not sufficiently serious to warrant a three-hour detention for photographing.[78] The Washington Supreme Court flatly rejected the balancing approach in *In Re Armed Robbery.*[79] In that case the supreme court refused to order participation in a lineup without probable cause, emphasizing that probable cause was required in the great majority of fourth amendment cases. Although the court acknowledged that *Terry* represented an exception to the requirement, it maintained that the exception was to be construed narrowly and was unwilling to extend *Terry* to what it believed to be the substantially intrusive act of a compelled

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connected with a formal arrest, may be used constitutionally in other than serious felonies involving grave personal injuries or threats of the same. The government interest, though serious, is not of the same magnitude in commercial crimes involving property or money such as forgery or false pretenses or other less serious offenses.

Id. at 216.

74. 93 N.J. 552, 461 A.2d 1155 (1983).

75. The court promulgated four standards to be met before an order would issue: 1) sufficient evidence to demonstrate that a crime has been committed and was under active investigation; 2) a reasonable and well founded basis to believe the individual committed the offense; 3) results of the procedures must significantly advance the investigation; and 4) evidence must be obtainable otherwise. The court required procedural safeguards in addition. For example, the suspect was to be afforded the right to counsel during the procedures, and the procedures if possible were to be conducted at a time convenient for the suspect.

The court noted that the legislature was the appropriate body to deal with the complex subject matter but held that the standards and safeguards which it promulaated sufficiently minimized the intrusion to pass constitutional muster.

76. The court concluded that the lineup met the *Davis* requirements but added that there were some identification procedures that might not meet the *Davis* standards. *Id.* at 563, 461 A.2d at 1161.

Also upholding identification procedures on less than probable cause was In re Fingerprinting of M.B., 125 N.J. Super. 115, 309 A.2d 3 (App. Div. 1973) (fingerprinting of all members of 8th grade class permitted under order containing several safeguards).

77. 135 N.J. Super. 190, 342 A.2d 903 (1975).

78. The court noted that the cases in which identification orders have been allowed generally have involved murder, sexual abuse or other serious crime. *Id.* at 195, 342 A.2d at 906. *But see* Long v. Garrett, 22 Ariz. App. 397, 527 P.2d 1240 (1974) (order approved for handwriting sample in investigation of stolen check worth $157).

79. 99 Wash. 2d 106, 659 P.2d 1092 (1983).

lineup.[80]

IV. The Constitutional Question in Light of Recent Supreme Court Decisions

A. Predicting the Supreme Court's Approach: Per Se Rule or Balancing Test?

> Perhaps more so than most areas of the law, attempting to comprehend the fourth amendment cases is rather like stepping through the looking glass with Alice. Precedents and analytical approaches appear and disappear like the Cheshire Cat.[81]

This subsection identifies the criteria by which the current Supreme Court would probably judge the constitutionality of identification procedures on less than probable cause if faced with the proper case. To understand the views of the present court, it is first necessary to examine how various interpretations of the fourth amendment have shaped the body of precedent. The words of the amendment are an appropriate place to begin.

The fourth amendment sets forth its protections in two conjunctive clauses. The first provides that, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated" (reasonableness clause). The second clause continues, "and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized" (warrant clause).[82] The amendment does not proscribe all state intrusions — only those that are unreasonable.[83] Therefore, propriety of police conduct depends on its reasonableness. Unfortunately, "unreasonable" is not defined. Moreover, the structure of the amendment leaves uncertain what role the warrant clause should play in determining reasonableness.[84] This ambiguity has led

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80. The court relied heavily upon Dunaway v. New York, 442 U.S. 200 (1979). *Accord*, United States v. Jennings, 468 F.2d 111 (9th Cir. 1972) (*Terry*, on-the-spot detention should not be extended to cover forced trip to police station, fingerprinting, photographing, and completion of lengthy arrest report).

81. Bacigal, *supra* note 19, at 763.

82. U.S. CONST. AMEND. IV.

83. Carroll v. United States, 267 U.S. 132, 147 (1924).

84. *See* Stelzer, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10 N.M.L. REV. 33 (1979-1980), 1 W. LAFAVE, *supra* note 11, § 3.1, at 439. This fault has been criticized. *See* J. TANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42-43 (1969); Devlin, *The Police in a Changing Society*, 57 J. CRIM. LAW CRIM. POL SCI. 123, 128 (1966).

Uncertainty caused by the structure of the amendment may be in large part due to defects in the drafting process. The amendment as originally introduced by James Madison read as follows:

> The right of the people to be secured in their persons, their houses, their papers,

to two competing theories of the proper criteria for judging reasonableness.

The first position emphasizes the link between the reasonableness clause and warrant clause. Under this view, police action that does not comply with the provisions of the second clause is precisely what the first clause proscribes as "unreasonable." Therefore, all search and seizures that are not supported by a warrant based on probable cause and appropriately specified are unreasonable and so impermissible.[85]

The second position regards the two parts of the amendment as separate and independent protections. Under this theory, while the warrant clause serves to establish the standards for a valid warrant, the presence or absence of a warrant is not conclusive as to reasonableness. Thus, the general prohibition of unreasonable searches and seizures in the first clause is overarching. This analysis requires that the question of reasonableness be judged not by the mechanical test of whether the police obtained a warrant, but by all the facts and circumstances of each case, hence, a balancing.[86]

Debate over the proper interpretation has brought inconsistency and complexity to the Supreme Court's decisions.[87] In the earliest

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and their property, from all unreasonable searches and seizures shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

Thus in the amendment's original form, the prohibition of unreasonable searches and seizures was directly linked to the requirement of warrant based on probable cause. Dissatisfied with the language "by warrants issued" Representative Benson suggested the stronger phrase "and no warrant shall issue." His proposal was defeated by a sizeable majority. Yet, as chairman of the committee charged with reporting the House version, Benson simply reported to the Senate his own formulation. It was this language that was subsequently approved by the Senate and then ratified by the states. Hence the present confusion caused by the conjunctive form. *See* Stelzer, *supra* note 84; 3 W. LAFAVE *supra* note 11.

85. This approach is based on a reading of the amendment in light of its historic origin. The fourth amendment, like similar provisions adopted in the various state constitutions, was a reaction to the oppressive writs of assistance, court orders used by the British to enforce custom regulations. The writs were in the form of a standing search warrant; they authorized the inspection of any house at any time upon the officer's discretion, without any particular suspicion that the person had committed a violation. Because the fourth amendment and specific safeguards of the warrant clause sought to prevent this practice, some have concluded that only those search and seizures which conform to the requirements of the warrant clause are acceptable. *See* Stelzer, *supra* note 84.

86. The advocates of this view maintain that the framers did not intend the warrant clause to be the exclusive definition of a reasonable search or seizure. They point out that certain police intrusions at the time of the amendment's adoption had been assumed to be permissible even though unsupported by a warrant (e.g., a search incident to a lawful arrest). In their view, since constitution itself provides no ready test for determining reasonableness, the question must be resolved in a common sense, case-by-case method.

87. *Compare* United States v. Rabinowitz, 339 U.S. 56 (1950) (majority opinion applying general reasonableness approach) *overruled in* Chimmel v. California, 395 U.S. 752 (1969) *with* Boyd v. United States, 116 U.S. 616 (1886) (provisions of warrant clause crucial in determining reasonableness).

Some members of the Court have espoused the view that the reasonableness clause places limits on the government's power *in addition* to those of the warrant clause. Under this theory

cases to interpret the amendment, the Court stressed the provisions' historic origins. In *Boyd v. United States*,[88] the Court reasoned that since the framers spoke of unreasonable searches and seizures with the oppressive writs of assistance in mind,[89] the provisions of the warrant clause which specifically guarded against those practices should play a crucial role in determining reasonableness. Thus, in *In Re Jackson*,[90] the Court assumed that the fourth amendment required the police to have a warrant before they seized a sealed package from the mail. The rationale of these cases slowly evolved[91] into a general rule that searches and seizures that were not conducted pursuant to a warrant[92] and based on probable cause were unconstitutional per se.[93] While the Court did excuse the failure to obtain advance judicial approval in a limited number of emergency situations,[94] these departures were viewed as historic exceptions to the per se rule. In no case was the Court willing to lift the requirement of probable cause.[95] For example, in *Carroll v. United States*,[96] the Court stated: "In cases where the securing of a warrant is reasonably practicable it must be used. . . . In cases where seizure is impossible except without a warrant the seizing officer acts unlawfully and at his peril unless he can show the Court probable cause."[97]

The per se rule provided a strict standard for full searches and seizures. But a question arose whether it was the appropriate standard by which to judge all police activity. Techniques such as brief on-the-street stops of persons were substantially less intrusive than an arrest and were important law enforcement tools. Yet the investigatory nature of these procedures was antithetical to a showing or probable cause.[98] A court operating under the per se rule was forced

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the warrant clause imposes procedural restrictions and the reasonable clause is an additional substantive check. *See, e.g.*, Andressen v. Maryland, 427 U.S. 463, 493 (1976) (Brennan, J., dissenting); Warden v. Hayden, 387 U.S. 294, 312 (1967) (Douglas, J., dissenting). *See generally*, Bacigal, *supra* note 19, at 764 n.6.

88. 116 U.S. 616 (1886).

89. *See infra* note 84 and accompanying text.

90. 96 U.S. 127 (1877).

91. Most of the fourth amendment precedent did not develop until about 1920. *See* Bacigal, *supra* note 19, at 767, n.22.

92. The purposes of the warrant requirement was stated by Justice Douglas in McDonald v. United States, 335 U.S. 451, 455-56 (1948): "The presence of a search warrant serves a high function. . . . [I]t interpose[s] a magistrate between the citizen and the police. . . . [The warrant requirement] was done so that an objective mind might weight the need to invade that privacy in order to enforce the law."

93. *See* Henry v. United States, 361 U.S. 98 (1959). This view was not at all times shared by all members of the Court. *See* United States v. Rabinowitz, 392 U.S. 56 (1950), *overruled in* Chimel v. California, 395 U.S. 752 (1969).

94. *See, e.g.*, Chimmel v. California, 395 U.S. 752 (1969) (search incident valid arrest).

95. Cupp v. Murphy, 412 U.S. 291 (1973).

96. 267 U.S. 132 (1927).

97. *Id.* at 156.

98. The court would not hold brief on-the-street stops invalid for lack of a judicial

either to declare the practices unconstitutional or hold that they did not constitute searches and seizures within the fourth amendment's protection.[99] Dissatisfaction with this all-or-nothing choice led the Supreme Court to introduce modifications in *Camara v. Municipal Court*[100] and *Terry v. Ohio*.[101]

In *Camara* the issue was the constitutionality of area-wide housing inspections that were designed to enforce local health and safety regulations.[102] As discussed above, the searches were conducted in every house, regardless whether authorities had evidence of a specific violation — a procedure that local officials argued was necessary because violations were not detectable from the outside. In keeping with precedent, the Court held that the searches were permissible only if supported by a warrant and probable cause.[103] But the Court avoided the rigidity of the per se rule by remodeling the concept of probable cause. Rather than taking the standard to mean a reasonable belief that a violation had been committed, the Court defined probable cause as the standard of suspicion that reasonably justified the official procedure in light of the public's interest and offensiveness of the practice.[104] In other words, so long as the degree of suspicion was reasonable—whatever its strength—toward a particular person, the Court would consider it probable cause. Applying this standard, the Court held that area-wide searches conducted pursuant to a legislative or administrative scheme were reasonable regardless of whether there was particularized probable cause.[105] Thus, while the Supreme Court intimated that the requirement of a warrant supported by probable cause still controlled, it had in *Camara* altered the concept of probable cause, for the first time relaxing the determination of probable cause to reasonableness under circumstances unrelated to the particular subject of the search.[106]

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warrant. Rather, this necessarily swift action would fit under the exigent circumstances exception to the warrant requirement. *See* Terry v. Ohio, 392 U.S. 1, 20 (1968).

99. *Compare* Henry v. United States, 361 U.S. 98 (1959) *with* Frank v. Maryland, 359 U.S. 360 (1959).

100. *Camara*, 387 U.S. 523 (1967).

101. *Terry*, 392 U.S. 1 (1968).

102. For the text of the municipal ordinance authorizing the searches *see supra* note 21. For a detailed discussion of the constitutionality of administrative inspections *see* 3 W. LAFAVE, *supra* note 11, § 10.1-§ 10.4.

103. The Court's ruling that a warrant was necessary directly overruled its prior holding in Frank v. Maryland, 359 U.S. 360 (1959). Prior to *Camara*, the *Frank* ruling was generally interpreted as an exception to the warrant requirement for administrative searches. *See* Camara v. Municipal Court, 387, U.S. 523, 529 (1967).

104. *Camara*, 387 U.S. at 534-535.

105. *Id.* at 538. The court in See v. City of Seattle, 387 U.S. 541 (1967), a companion case to *Camara*, applied identical reasoning to hold that administrative searches of business premises were permissible without probable cause to believe a specific code violation existed.

106. Justice White's remodeling of the probable cause requirement was unprecedented. Justice Clark dissented from the *Camara* decision, remarking "[The Court's] newfangled warrant system is entirely foreign to fourth amendment standards." Camara v. Municipal Ct., 387

In *Terry*, an experienced police officer had stopped a man whom he believed to be armed and about to commit a robbery. When the man answered the officer's questions inaudibly, the officer briefly frisked the man's outer clothing. The frisk produced a revolver. Terry challenged the validity of the search, arguing that the officers did not have probable cause. The state countered, contending that an officer must be given the authority to protect himself without having to satisfy a rigid probable cause requirement before acting.[107]

Ultimately, the Supreme Court upheld the frisk despite the absence of probable cause. Reasoning that this conduct "historically had not been, and as a practical matter could not be, subjected to the warrant procedure,"[108] the Court held the additional Warrant Clause requirement of probable cause inapplicable. Instead, the court tested the conduct only under the fourth amendment's general proscription against "unreasonable searches and seizures"[109] and concluded that the officer was justified in making the frisk upon his reasonable belief that the suspect was armed and dangerous regardless of the existence of probable cause.[110]

By holding that some police conduct might be supported by suspicion less than traditional probable cause, *Camara* and *Terry* threw the validity of the per se rule into question. While there is broad language in each opinion reinforcing this change,[111] the Court care-

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U.S. 523, 547 (Clark dissenting). Generally, other members of the court have not adopted his approach. *But see* Almeida-Sanches v. United States, 413 U.S. 266 (1973) (Powell, J., concurring). Apparently Justice White's primary concern was guaranteeing that the inspections were made pursuant to some type of judicial authorization. His indirect submerging of the probable cause requirement may have been out of concern of violating the fourth amendment command that "no warrant shall issue but on probable cause." U.S. CONST. amend. IV. Perhaps for the same reason, all the state schemes are denominated "orders" for identification procedures rather than warrants.

107. The state also argued that the frisk was not prohibited by the fourth amendment because it did not rise to the level of a full search. The Court sternly rejected this argument, and holding that the action was subject to fourth amendment scrutiny. *Terry*, 392 U.S. at 19.

108. *Id.* at 20.

109. *Id.*

110. *Id.* at 30.

The Court's holding that a police officer may act on less suspicion when acting without a warrant precisely because he *is* so acting without a warrant suggests that a police officer possesses more power when acting upon his own initiative than he would when acting under judicial warrant. Justice Douglas, dissenting in Terry 392 U.S. at 36 (Douglas, J., dissenting), was correct in pointing out that the Court's prior holdings were consistently to the contrary. *See* Wong Sun v. United States, 371 U.S. 471, 479 in which the Court stated, "Whether or not the requirements of reliability and particularly of information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent, than where an arrest warrant is obtained." The *Terry* decision is usually cited for its holding that the reasonableness clause is applicable, with the Court's underlying process left unmentioned. *See, e.g.*, Wise v. Murphy, 270 A.2d 305 (D.C. Cir. 1970). Indeed if the Court's underlying process were strictly applied, *Terry* would not support identification procedures on less than probable cause at all because they are subject to the warrant requirement.

111. In *Camara* the concept of "variable probable cause" was said to apply whenever a warrant was required. 387 U.S. at 534. And in *Terry*, the Court intimated that a reasonableness test was to be applied whenever a warrant was not required. *Terry*, 392 U.S. at 20.

fully crafted its holdings in narrow terms in both the *Camara* and *Terry* decisions.[112]

Initially, the Supreme Court interpreted the precedent it had laid in *Camara* and *Terry* narrowly. For instance, in *Sibron v. New York*,[113] a companion case to *Terry*, the Court ruled that a search of a suspected narcotics carrier was invalid. As in *Terry*, the search was very limited, but the Court ruled that since the officer did not act out of self protection, the search did not fit within the *Terry* exception and therefore had to be based on probable cause.[114] In *Almeida Sanchez v. United States*,[115] the Court held that the search of an auto for illegal aliens had to be based on probable cause, rejecting the government's argument that because of heightened public interest in policing the border, the practice should be judged by reasonableness.[116]

In a second line of decisions, the Court appeared to change its position and to begin applying the reasonableness test liberally. For example, in *United States v. Brignoni-Ponce*,[117] the Court held that roving border patrols could stop automobiles upon a reasonable suspicion that they contained illegal aliens. And in *Delaware v. Prouse*,[118] the Court recognized the power of the police to order a driver of a vehicle stopped for another lawful purpose to step out of the vehicle even though there was no reason to believe that the particular person was armed. In these cases the Court apparently employed the *Terry* balancing test without regard to whether the government interest or the nature of the intrusion approximated that in *Terry*.[119]

In 1979 the Court changed direction once again with its decision in *Dunaway v. New York*.[120] In that case, police had seized a

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112. Justice White noted in *Camara* that the approach utilized by the Court "neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area." *Camara*, 387 U.S. at 539. In *Terry*, the Court explained, "Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him." *Terry*, 392 U.S. at 16.

113. 392 U.S. 40 (1968).

114. *Id.* at 65.

115. 413 U.S. 266 (1973).

116. *Id.* at 273. Justice Stewart, writing the opinion for the Court, stated, "The needs of law enforcement stand in constant tension with the constitution's protection of the individual against certain exercises of official power." *Id.*

Two additional cases in which the Court interpreted *Terry* narrowly are Cupp v. Murphy, 412 U.S. 291 (1973) (scraping of fingernails requires probable cause despite less intrusiveness than full search) and Davis v. Mississippi, 394 U.S. 721 (1969) (detention for fingerprints and questioning requires probable cause).

117. 422 U.S. 873 (1975).

118. 440 U.S. 648 (1979).

119. The Court's willingness to apply a balancing test during this period is dramatically demonstrated by United States v. Crtiz, 422 U.S. 891 (1975) in which the Court applied such an approach even though the police conduct was a full search of a stopped automobile.

120. 442 U.S. 200 (1979).

murder suspect and transported him to the police station where he was subjected to a lengthy interrogation. In review, the Court held that the police conduct was unconstitutional because it was not based on probable cause. Writing for the Court, Justice Brennan emphasized the historic importance of the probable cause requirement. The Court interpreted *Terry* to be only a narrow exception to the rule requiring probable cause. Moreover, the court explained, the *Terry* balancing test was to be applied only when the conduct was substantially less intrusive than a full arrest; in all other cases, probable cause would be required.[121]

The Supreme Court's failure to take a consistent position has continued in its most recent decisions. Two distinct approaches underlie two 1983 cases on the subject of search and seizure. In *United States v. Villamonte-Marquez*,[122] the Court was called to pass on the constitutionality of a federal statute[123] which authorized custom officers to board any ship at any time to examine documents and papers. Authorities had randomly boarded Villamonte-Marquez's vessel and uncovered a large quantity of marijuana. Without discussing whether the *Terry* precedent was applicable, Justice Rehnquist, writing for the majority, applied a reasonableness test. The Court ruled that the stops could be made without any suspicion that a particular boat was violating the law.[124] In *United States v. Place*,[125] airport authorities stopped a man whom they believed to be carrying narcotics. As their suspicions deepened, the authorities seized the man's luggage and, ninety minutes later, at a different location, submitted it to a narcotics dog sniff test. On review, the Supreme Court held that under other circumstances the detention of luggage might be permissible on less than probable cause, but "it is clear that the police conduct here exceeded the permissible limits of a Terry-type investigative stop."[126]

Under the first approach, employed in *Villamonte-Marquez*, the Court assumed the *Terry* balancing test to be applicable in all cases in which the police intrusion did not amount to a full search or seizure. In the second approach, applied in *Place*, the Court initially determined whether the police practice was within the *Terry* exception. Only in this instance would the balancing test be applicable. If the Court found the practice to be outside the *Terry* exception, probable cause would be the standard. The second approach contemplates that at least some lesser intrusions are unconstitutional per se

121. *Id.* at 209-13.
122. 103 S. Ct. 2573 (1983).
123. 19 U.S.C. § 1581(a) (1976).
124. 103 S. Ct. at 2582.
125. 103 S. Ct. 2637.
126. *Id.* at 2645.

when not supported by probable cause. However, even under this approach the court apparently engages in some sort of balancing. Moreover, the *Terry* rationale has been expanded to include a variety of conduct of the police and of the government not contemplated in the *Terry* opinion; therefore, the boundaries of this exception are not clear.[127] The determination of whether any specific practice falls within the *Terry* exception is actually another way of stating the Court's conclusion on whether the conduct is reasonable on grounds less than probable cause. Those practices thought to be reasonable are declared to be within the exception, those thought not reasonable are declared to be outside the exception.

Thus, identification procedures on less than probable cause will not simply be declared invalid because they violate the per se rule. The Court will judge the procedures by their reasonableness, either by an acknowledged balancing test under the first approach or a silent balancing test under the second approach.

B. The Reasonableness of Identification Procedures on Less than Probable Cause

1. *Explanation of the Test.* — Under a reasonable test, a court will evaluate all the facts and circumstances of the case.[128] The factors can be grouped into three considerations: 1) the intrusiveness of the police conduct from the individual's point of view; 2) the importance of the public interest supporting the police practice; and 3) the strength of the evidence which links the suspect with the commission of the crime. Courts often speak of the procedure of evaluating these competing factors as a balancing process.[129] They place the offensiveness of the investigative conduct on one side of the scale and the public interest in the procedure on the opposite side. Then they add the weight of the evidence to the public interest side. If this combination outweighs the individual interest, courts will allow the conduct. Courts will forbid the practice if the opposite is true. The procedure requires that courts assign some relative weight to the government interest and to the severity of the personal intrusion.[130] Ranking the factors is necessarily both difficult and subjective. For instance, what is more intrusive, a brief patdown for weapons or be-

127. *See supra* notes 117-19 and accompanying text.

128. *See, e.g.*, Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam).

129. The concept of a balancing test was first introduced in Camara v. Municipal Court, 387 U.S. 523 (1967).

130. Under a per se rule, no ranking of the government interest is required. Probable cause is the standard applied regardless of differentials in the police need or intrusiveness of the procedure. The difficulty of assigning a relative weight to these variables has led some courts and commentators to conclude that the balancing test should only be applied when absolutely required. *See* Dunaway v. New York, 442 U.S. 200 (1979).

ing taken into custody to participate in a lineup? Which is a more compelling public interest, detection of illegal aliens or the control of international drug smuggling? In addition, courts must make an equally subjective comparison of the private interest to the public interest.[131] Since a court's decision is largely based on value judgments, the outcome of balancing is difficult to predict. If it is available, precedent is the best guide.

2. *The Test as Applied by the Supreme Court.* — The following chart lists the *Camara* and *Terry* decisions along with sixteen subsequent Supreme Court cases in which the Court examined the constitutionality of police conduct that is less offensive than an arrest or full search.

PUBLIC INTEREST	POLICE PRACTICE	SUSPICION REQUIRED
Office Safety		
Terry v. Ohio (1968)[132]	frisk	L/PC
Pa. v. Mimms (1977)[133]	order to get out of car	L/PC*
Health and Safety Standards		
Camara v. Municipal Court (1967)[134]	inspection of residence	L/PC*
Detection of illegal aliens		
Almeida-Sanchez v. U.S. (1973)[135]	search of auto (roving patrol)	P/C
U.S. v. Ortiz (1975)[136]	search of auto (fixed chk. pt.)	P/C
U.S. v. Brignoni-Ponce (1975)[137]	stop of auto (roving patrol)	L/PC
U.S. v. Martinez-Fuerte (1976)[138]	stop of auto (fixed chk. pt.)	L/PC*
Investigation of Crime		
Cupp v. Murphy (1973)[139]	scraping of fingernails	P/C
Sibron v. N.Y. (1968)[140]	frisk	P/C
Ybarra v. Ill. (1973)[141]	frisk	P/C
Dunaway v. N.Y. (1979)[142]	taking into custody and lengthy questioning	P/C

131. The difficulty of applying a balancing test is heightened when a police officer must make the decision in the heat of a criminal investigation.
132. 392 U.S. 1 (1968).
133. 434 U.S. 106 (1977).
134. 387 U.S. 523 (1967).
135. 413 U.S. 266 (1973).
136. 422 U.S. 891 (1975).
137. 422 U.S. 873 (1975).
138. 428 U.S. 543 (1976).
139. 412 U.S. 291 (1973).
140. 392 U.S. 40 (1968).
141. 444 U.S. 85 (1979).
142. 442 U.S. 200 (1979).

PUBLIC INTEREST (cont'd)	POLICE PRACTICE (cont'd)	SUSPICION REQUIRED (cont'd)
Davis v. Mississippi (1969)[143]	taking into custody, brief questioning & fingerprinting	P/C
Fla. v. Royer (1983)[144]	taking to airport security office & brief questioning	P/C
U.S. v. Place (1983)[145]	90 min. detention of luggage	P/C
Mich. v. Summers (1981)[146]	detention during execution of search warrant	L/PC*
Del. v. Prouse (1979)[147]	stop of auto (roving patrol)	L/PC
U.S. v. Villamonte-Marquez (1983)[148]	stop and boarding boat (roving patrol)	L/PC*
Adams v. Williams (1972)[149]	stop on the street for questioning	L/PC

The name of the decisions appears with the particular police practice employed and the level of suspicion required by the Court.[150] The cases are grouped according to the public interest implicated under their facts. By organizing the cases in this manner, the nature of the public interest is controlled for, making comparison along the line of the challenged practice meaningful. Of course, this scheme fails to take into account the severity of the crime. Further refinements may not be crucial, however, because outside the interests of officer safety and enforcement of municipal code; the Court has focused primarily on the intrusiveness of the police conduct.[151]

The subject of this comment, identification procedures used in criminal investigations, would fall under the last listed category. The cases in this category demonstrate that the Court has drawn a line between conduct it regards as so intrusive that probable cause is required and conduct it thinks less intrusive justifying a lesser standard. The Court has not definitively answered the crucial question on which side of the line identification procedures fall. State schemes assume that all identification orders issued according to their terms fall on the less-than-probable-cause side of the line.[152] Courts that have authorized detentions for lineups, fingerprinting, handwriting, photographing, hair samples, and blood samples uniformly have

143. 394 U.S. 721 (1969).
144. 460 U.S. 491 (1983).
145. 103 S. Ct. 2637 (1983).
146. 452 U.S. 692 (1981).
147. 440 U.S. 648 (1979).
148. 103 S. Ct. 2573 (1983).
149. 407 U.S. 143 (1972).
150. "P/C" indicates probable cause, "LP/C" indicates less than probable cause. In cases where an "*" appears, the Court held that particularized suspicion was not required to support the action.
151. For an example of how public interest has proved decisive when officer safety was involved, *compare* Terry v. Ohio, 392 U.S. 1 *with* Ybarra v. Illinois, 444 U.S. 85 (1979).
152. For a description of these schemes *see supra* notes 41-50 and accompanying text.

placed those procedures on the less-than-probable-cause side of the line.[153]

But the state schemes approving forced identification on less than probable cause may have misperceived the likely direction of the Supreme Court. For although the Court has not categorized identification procedures one way or the other, it has been consistently sensitive to the degree of intrusiveness that can be said to be characteristic of forced identification procedures. Taking physical evidence involves two phases of state action. The first is compelling the person to appear at the place where the authorities will carry out the procedure. Requiring a person to be present at a designated time and place is a significant interference with that person's liberty and under certain circumstances may be extremely inconvenient or even costly.[154] Compelled appearance is substantially different from a brief detainment of the individual at the place where he is found — significantly, the only police practice the Supreme Court has upheld without probable cause in the criminal investigation context. The second phase of identification procedures is the extraction of the evidence.

In determining that fingerprinting was a relatively unobtrusive procedure, the Court in *Davis* pointed out that "[fingerprinting] involves none of the probing into an individual's private life and thoughts that mark an interrogation or search."[155] Consistent with this statement, the Supreme Court has not approved any type of search on less than probable cause when the government interest is merely the investigation of a crime.[156] Certainly, this position casts doubt on the constitutionality of identification procedures based on less than probable cause that rise to the level of full "searches."[157] Both the taking of blood and scraping of fingernails specifically have been held to be searches that require probable cause[158] and is no reason why a lesser level of suspicion should suffice simply because the taking blood or scraping of nails is done pursuant to a judicial order[159] under a state scheme.[160] Even if the procedure is not held to

153. For a discussion of these cases *see supra* notes 58-76 and accompanying text.

154. For example a suspect may be required to miss time at work or be unable to participate in a planned activity.

155. *Davis*, 394 U.S. at 727 (1969).

156. *But see* 3 W. LAFAVE, *supra* note 11, § 9.6, at 161-62 (procedures which constitute limited searches should be permitted).

157. *See* Sibron v. New York, 392 U.S. 40 (1968), Ybarra v. Illinois, 444 U.S. 85 (1979). In Terry v. Ohio, 392 U.S. 1 (1968), the Court permitted a brief frisk for weapons on less than probable cause, but only in cases in which the officer's safety was at stake. In Camara v. Municipal Court, 387 U.S. 523 (1967), the Court allowed a full search of a person's residence without a showing or probable cause. The Court in *Camara*, however expressly distinguished searches in the criminal context.

158. 389 U.S. 347 (1967).

159. For an application of the Katz text *see* United States v. Dionisio, 410 U.S. 1

be a search in itself (which most would not under the *Katz v. United States*[161] expectation of privacy test) what the authorities would have the suspect do still must be taken into account in evaluating the total intrusiveness of the procedure.

A second aspect the Supreme Court would consider in reviewing an identification procedure based on less than probable cause, is the location where the police confront the suspect. Outside of the health and safety inspection allowed in *Camara*, the Court has only been willing to depart from the probable cause standard when the police practice grows out of a spontaneous on-the-scene contact with the suspect. In contrast, identification procedures usually contemplate a forced visit to the police station. The difference is a heightened possibility that some sort of social stigma will attach to the procedures — a factor that correspondingly enhances the overall intrusiveness of the procedures.[162] For example, in *Michigan v. Summers*,[163] the Court upheld the forced detention of an individual while his home was being searched pursuant to a warrant. The Court explained that one of the reasons why the police practice was sufficiently slight to justify a departure from probable cause was the fact that detention occurred where the police found the detainee.

A third consideration for the Court would be the amount of time required to complete the procedures. Beyond *Michigan v. Summers*,[164] in which the Court did not mention the time element, the Court has allowed only brief detention for questioning on less than probable cause. In fact, the Court highlighted the importance of brevity in *United States v. Brignoni-Ponce*,[165] in which it stated: "The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause."[166] In *United States v. Place*,[167] the Court held that a ninety minute detention of luggage required probable cause based upon the duration of the detention

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(1973).

160. Cupp v. Murphy, 412 U.S. 291 (1973) (scraping of fingernails); Schmerber v. California, 384 U.S. 757 (1966) (taking of blood samples).

161. For this reason, the UNIF. R. CRIM. P. 436 does not authorize the taking of blood or urine samples. *See supra* note 52, *but see* state schemes, discussed *supra* notes 41-50 and accompanying text. which all provide for the taking of blood.

162. Social stigma may be reduced when the suspect is allowed to appear at the station on his own initiative rather than by police escort. Some state schemes allow for this possibility. *See supra* note 45. *See also* United States v. Dionisio, 410 U.S. (1973). This option, however, may not be available when there is reason to suspect that the suspect will flee or destroy the evidence when served with the order.

163. 452 U.S. 692 (1981).

164. *Id.*

165. 422 U.S. 873, 881-82 (1975).

166. *Id.* at 881, 882.

167. 103 S. Ct. 2637 (1983).

alone. In contrast, many state schemes authorize detention for three, four, and five hour periods; others place no limit on the amount of time.[168] Given these pronouncements of the Supreme Court, identification procedures that entail a lengthy detention at the police station appear constitutionally suspect at the least.

Precisely which procedures the Court would approve and under what circumstances, of course, is difficult to determine. This prediction is made particularly difficult because the Court has provided little guidance in the area and because, by its very nature, an evaluation of intrusiveness is always a subjective determination. At least it is clear that the less intrusive the practice, the greater its chance of validity. Courts sensitized to the foreseeable misgivings of the Supreme Court can impose suitable restrictions on the identification procedures. Additional safeguards such as keeping the proceeding private, providing counsel, and destruction of negative evidence may further minimize the intrusion without lessening the usefulness of the practice.

V. Conclusion

The Supreme Court has demonstrated a willingness to consider the justification for and slightness of police conduct in fourth amendment search-and-seizure cases and has in some cases loosened the requirement of probable cause. *Davis v. Mississippi* suggests that a similar analysis may be applicable to forced identification procedures on evidence which amounts to less than probable cause. The *Davis* dictum, however, should not be read as a broad grant of authority to dispose of the probable cause requirement whenever the police seek an identification procedure. The Supreme Court has only been willing to allow a lesser standard when the police conduct was substantially less intrusive than a full search or arrest. Several aspects of identification procedures appear to be more intrusive than any criminal investigatory technique thus far allowed on less than probable cause.

Because comparison of physical evidence is a particularly effective law enforcement tool, the Supreme Court may be persuaded to tolerate a greater intrusion. In the absence of specific Supreme Court guidance, however, courts and legislatures probably should err on the side of individual rights and closely scrutinize the intrusiveness of the particular proceeding. In particular, courts should examine the amount of time contemplated by the procedure, the nature of the procedure, and the possibility of social stigma attaching to the subject of the procedure. Any additional safeguards that would fur-

168. *See supra* notes 42-46.

ther minimize the intrusion should be applied. Only under such restrictions are compelled identification procedures likely to fall within the "narrowly defined circumstances" contemplated by *Davis*.

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